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Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 474 and 475.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF FOR THE APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 474 and 475.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF FOR THE APPELLANT.

Opinions Below.

The opinion of the Superior Court of Fulton County on the petition for *habeas corpus* (R., 89) has not been officially reported. The opinion of the Supreme Court of Georgia (R., 100) is reported in 182 Ga. 582. The original

opinion of the Supreme Court of Georgia, on appeal from the judgment of conviction, is reported in 178 Ga. 832 and its opinion upon the denial of a petition for rehearing is reported in 179 Ga. 597. No opinion was rendered by the original Trial Court. The opinion of this Court dismissing for want of jurisdiction the appeal from the judgment affirming the conviction is reported in 295 U. S. 441. The dissenting opinion of Mr. Justice Cardozo (in which Mr. Justice Brandeis and Mr. Justice Stone concurred) appears in 295 U. S. 446. This Court's denial of a petition for rehearing is recorded in 296 U. S. 661.

Jurisdiction.

The judgment of the Court below was entered June 13, 1936. The petition for the allowance of an appeal was presented to Hon. Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia on September 10, 1936, and the appeal was allowed by him on that day. This Court noted probable jurisdiction on November 23, 1936. Jurisdiction to review the judgment of the court below upon appeal is founded upon Section 237(a) of the Judicial Code as amended by the Acts of February 13, 1925, January 31 and April 26, 1928. The validity of a Statute of the State of Georgia, as construed and applied in this case, was drawn into question and the decision was in favor of its validity.

Statute Involved.

The statute, the validity of which as construed and applied to appellant was drawn into question by proceedings on *habeas corpus*, is Section 56 of the Penal Code of Georgia (Acts, 1866, p. 152), which provides:

> "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful

authority of the State shall constitute an attempt to incite insurrection.'"[1]

The statute was construed by the Supreme Court of Georgia in its opinion upon the petition for rehearing of the judgment affirming appellant's conviction[2] in the following manner:

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[1]The punishment for an attempt to incite insurrection is provided by Section 57 of the Penal Code (Acts, 1866, pp. 152, 153, as amended by Acts, 1871, pp. 19, 20) as follows:

> "Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years."

Insurrection is defined in Section 55 of the Penal Code (Acts, 1866, pp. 152, 153) as follows:

> "Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence."

[2]In its original opinion affirming the judgment of conviction the statute was construed somewhat differently, as follows: "* * * Force must have been contemplated but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. * * * Nor, would it be necessary to guilt, that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite * * *" (178 Ga. 855). The construction of the statute by the trial court differed radically from both constructions on appeal. The jury was charged "* * * That advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated" (See 179 Ga. 597).

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (179 Ga. 600).

In holding that appellant had violated the statute and affirming his conviction thereunder (178 Ga. 832, 179 Ga. 597) the Supreme Court of Georgia construed the statute to apply to the situation presented by the facts of this case.

Questions Presented.

1. Whether Section 56 of the Penal Code of Georgia, as construed and applied by the Supreme Court of Georgia, unreasonably restricts appellant's freedom of speech and of assembly and is, therefore, invalid under the due process clause of the Fourteenth Amendment.

2. Whether Section 56 of the Penal Code of Georgia, as construed and applied by the Supreme Court of Georgia, prescribes a standard of guilt which is so vague and indefinite that it is not susceptible of reasonable ascertainment and application and is, therefore, invalid under the due process clause of the Fourteenth Amendment.

3. Whether the Supreme Court of Georgia erred in sustaining the validity of the Statute as construed and applied, reversing the judgment of the Superior Court of Fulton

County in so far as it sustained appellant's contentions and ordered his release, and affirming the judgment of the Superior Court in so far as it overruled appellant's contentions.

Statement.

Appellant, a young Negro, petitioned for *habeas corpus* in the Superior Court of Fulton County, Georgia, his petition alleging that he was unlawfully detained and held in custody by the appellee, J. I. Lowry, as Sheriff of the County, the sole claim of authority under which he was held being a judgment of the Superior Court of Fulton County reciting his conviction under Section 56 of the Georgia Penal Code of "attempting to incite insurrection" and sentencing him to confinement in the Fulton County jail until his removal therefrom for imprisonment at hard labor in the Georgia penitentiary or some other place designated by the Governor for not less than eighteen nor more than twenty years (R., 1-5). Attached to the petition were (1) a copy of the judgment of conviction (Exh. A, R., 6); (2) a copy of the indictment (Exh. B, R., 6-10)[1];

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[1]The indictment (R., 6-10) charged that on July 16, 1932 appellant "did make an attempt to incite insurrection and did make an attempt to induce others to join in combined resistance to the lawful authority of the State of Georgia with intent to the denial of the lawful authority of the State . . . . and with intent to defeat and overthrow the lawful authority of the State . . . . by open force and by violent means and by unlawful acts, said attempt to incite insurrection intended to be manifested by accused by unlawful acts and intended by accused to be accomplished by acts of violence * * *". The offense was alleged, in effect, to have been committed in the following manner:

(1) By calling and attending public assemblies "in the homes of various persons . . . . unknown" and making speeches to "vari-

(*Footnote continued on next page.*)

(3) a portion of the record in this Court, on appellant's appeal from the judgment of the Supreme Court of Georgia affirming his conviction, containing a full statement of the evidence upon which the verdict, judgment and other proceedings at the trial were based (Exh. C, R., 11-86). As the evidence is fully stated in Point I of this brief, a sum-

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(*Footnote continued from previous page.*)

ous persons . . . . unknown," with the purpose of organizing "a group and combination of persons white and colored, under the name and style of the Communist Party of America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of offering and making combined opposition and resistance to the lawful authority of the State of Georgia and for the purpose of overthrowing and defeating by force and violence the lawfully constituted authority of the State * * *";

(2) By soliciting "certain persons . . . . unknown" to "become members of the Communist Party and the Young Communist League"—"to the intent and purpose of creating, offering, establishing and waging war against the lawfully constituted authority of the State of Georgia for the purpose of overthrowing the lawfully constituted authority of the State . . . . by acts of violence and by revolution and establishing . . . . a new government known as United Soviets Soviet Russia, sometimes called and known as "The Dictatorship of the Propertyless People' ";

(3) By introducing, circulating and aiding in the introduction and circulation of "certain booklets, papers and other writings with the intent and purpose of inciting insurrection, riot, conspiracy, uprising against the constituted authority of the State and for the purpose of establishing combined resistance to and against the lawful authority of the State * * *". The following publications were specifically mentioned: "The Life and Struggles of Negro Toilers" by George Padmore; "Party Organizer" issued by The Central Committee, Communist Party; "Communism and Christianism" by Wm. Montgomery Brown; the "Daily Worker" and "The Southern Worker".

mary statement at this point has been omitted for the sake of brevity.

The petition alleged that "there is nothing in the evidence upon which petitioner's conviction is based to show that there was a clear and present danger that violence or other unlawful acts would result from petitioner's action, or that petitioner advocated violence or other unlawful acts, or that violence or other unlawful acts would probably result from any of petitioner's action, or that whatever violence or other unlawful acts might result from any of petitioner's actions would be likely to occur in the immediate or foreseeable future or at any given time" (R., 2). The indictment upon which the petitioner was tried, the judgment of conviction and the sentence of imprisonment were all alleged to be void and the detention to be illegal and unconstitutional because of the unconstitutionality of Section 56 of the Georgia Penal Code. The petition asserted that the Statute is invalid on its face and as construed and applied to the facts of his case by the Supreme Court of Georgia, by reason of the fact that as written and as thus construed and applied it is in conflict with the Fourteenth Amendment to the Constitution of the United States in the following particulars: "(a) It denies and unduly restricts petitioner's freedom of speech and of assembly" and "(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt" (R., 3). The invalidity of the Statute as construed and applied was also claimed under various provisions of the State constitution which are not now material. Finally, the petitioner alleged that there had been no adjudication in his case by any court of the validity under the Constitutions of the United States and of the State of Georgia of the Statute under which he was convicted.

The writ issued. The appellee answered, demurred specially to the portion of the petition incorporating the evidence contained in the record on appeal and, in addition,

moved to strike the allegation with respect to such incorporation, as well as the exhibit itself (R., 86-87). At the final hearing upon the petition and answer the portion of the record above referred to was identified, conceded by appellee to be a correct statement of the evidence presented at the trial, and was received in evidence over his objection (R., 92). The only evidence offered by appellee was a copy of the appellant's motion before trial to quash the indictment, which was received. The Court denied appellee's motion to strike, overruled his special demurrer and objection to the admission of the trial record and held (1) "that the applicant's contention that this law in question as construed and applied in his case, is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with Article I, Section 1, Paragraph 3 of the Constitution of the State of Georgia for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be, and the same is hereby sustained"; and that (2) "Contentions of applicant other than that above stated are not sustained" (R., 89-91). Appellant's ultimate release from custody was, therefore, ordered (R., 90-91).

Appellee appealed to the Supreme Court of Georgia assigning as error the rulings on his demurrer, motion and objection, and the decision that the Statute is invalid. As required by the Georgia practice to bring up for review the other grounds of invalidity urged in the petition and overruled by the Superior Court, appellant filed a cross-appeal assigning as error the decision adverse to those contentions. The two appeals were docketed as separate cases. In a single opinion the Supreme Court of Georgia reversed on appellee's appeal and affirmed on appellant's appeal. The opinion stated (a) "Neither as expressed, nor as it was construed by this Court" is the Statute void "as viola-

tive of the Fourteenth Amendment of the Federal Constitution" for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly"; and (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt"; (b) "Neither is the Statute so construed and applied void as violative" of various provisions of the State Constitution invoked by appellant; (c) The decision of the Superior Court that the Statute is unconstitutional under the Fourteenth Amendment and the provisions of the State Constitution on the ground that it is "too vague and indefinite to provide a sufficiently ascertainable standard of guilt" was erroneous; (d) There was no error "in refusing to hold the Statute void as violative of the several provisions of the State and Federal Constitutions for the several other grounds of attack urged against them • • • to which the cross-bill of exceptions relates"; (e) "Under the pleadings and evidence, which embraced the record on the trial that resulted in the conviction, the Court erred in the *habeas corpus* proceeding in refusing to remand the prisoner to the custody of the officers" (R., 100-102).

Specification of Errors to Be Urged.

1. The court below erred in holding that Section 56 of the Penal Code of Georgia as construed and applied to appellant is not void by reason of the fact that as thus construed and applied it is in conflict with the due process clause of the Fourteenth Amendment in that it denies and unduly restricts freedom of speech and of assembly.

2. The Court below erred in holding that Section 56 of the Penal Code of Georgia as construed and applied by the Supreme Court of Georgia in appellant's case, is not void as violative of the appellant's rights under the due

process clause of the Fourteenth Amendment because it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

3. The Court below erred in holding that Section 56 of the Penal Code of Georgia as construed and applied to appellant did not deprive appellant of his liberty without due process of law, in violation of the Fourteenth Amendment.

4. The Court below erred in reversing the judgment of the Superior Court of Fulton County in *habeas corpus* proceedings directing the eventual discharge of appellant from custody.

5. The Court below erred in directing that appellant be remanded to custody.

SUMMARY OF ARGUMENT.

I.

A.

The application of the statute to appellant is invalid because there is no evidence that appellant advocated or attempted to induce others to resort to force or to engage in acts of violence. The oral testimony failed to show any advocacy by appellant of the use of force or violence. The State failed to prove that appellant personally advocated the doctrine contained in the documentary evidence thought to be significant by the Court below. Minutes of meetings said to have been attended by appellant indicate that the meetings were called for lawful purposes. Even if the evidence is regarded as sufficient to charge appellant with advocacy of the doctrines set forth in the documentary evi-

dence, a calm analysis of its contents shows that it contained no advocacy of the use of force or violence. The view entertained by the Court below that violence must have been advocated because an attempt to put into effect the program indicated in the documentary evidence would result in violent opposition results in a denial of the constitutional protection at the point at which its importance begins. Appellant was not charged with obtaining members for a party with unlawful purposes. Furthermore, there was a total lack of evidence that in attempting to obtain members for the Communist Party appellant was advocating the use of force or violence or that the Party advocated such use. The evidence as a whole requires the conclusion that appellant was engaged in lawful political activities and no finding to the contrary can be sustained.

B.

Section 56 of the Georgia Penal Code as finally interpretated by the Court below on petition for rehearing of the judgment affirming appellant's conviction, does not require that the conduct which it proscribes involve the advocacy of immediate violence or a "clear and present danger" that it will result in violence or other unlawful acts. The statute thus contravenes the test laid down in *Schenck* v. *United States*, 249 U. S. 47. The continued vitality of that decision in stating a test to be applied to such statutes as the present has not been affected by later decisions of this Court. The requirement that conduct, to be punished validly, must involve the advocacy of immediate violence or give rise to a clear and present danger is necessary to protect and reconcile the undoubted right of the State to repel violent assault upon its sovereignty and the equally clear rights of freedom of speech and assembly guaranteed by the Fourteenth Amendment and essential to the preservation of the Republic.

The statute finds no support in the decisions in *Gitlow* v. *New York*, 268 U. S. 652, and *Whitney* v. *California*, 274 U. S. 357, because it does not condemn a specific doctrine identified by a description of its meaning and those decisions are therefore inapplicable. Even if the present statute is governed by those decisions, and the presumption of validity upon which they were based, it cannot be sustained. Examination of its back-ground and history shows that it was passed in substantially its present form in 1866; that its progenitors were aimed at conduct resulting in slave insurrections; that at the time of its passage in 1866, temporary conditions arising out of emancipation and other post-war disturbances gave concern to the legislature; that those conditions disappeared shortly after the war. There is no basis for concluding that the statute was aimed at conduct like appellant's and that conclusion is fortified by the failure to attempt an application of the statute until shortly before appellant was indicted. Conditions in Georgia, which the Court may judicially notice, negative the existence of any clear and present danger to the authority of the State arising out of activities connected with the organization of the Communist Party in Georgia. Under these circumstances, the statute cannot be regarded as a reasonable exercise of the State's police power to protect itself against violence.

C.

Even if the "clear and present danger" test applied in *Schenck* v. *United States*, *supra*, is not regarded as stating the limitation upon the right of the State to protect itself against abuse of the constitutional rights of free speech and assembly, nevertheless, the statute was invalid as applied to appellant since even if it be assumed that the evidence against appellant indicated advocacy of the ultimate use of force, its use was advocated only in the indefinite

future. No decision of this Court indicates that a State may constitutionally penalize utterances which may be deemed to import the use of force only at some indefinite time in the future.

II.

The statute as construed below eliminates the imminence or occurrence of force as an ingredient and requires only that defendant should intend that force should be used "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action". The standard of liability embodied in the statute as thus construed is so indefinite that it contravenes the due process clause of the Fourteenth Amendment. Consideration of the matters upon which a jury would have to speculate to reach a conclusion about the period of time thus designated, demonstrates that they are left without any definite standard to apply. In such a case as the present (assuming, contrary to the fact, that appellant had intended that force should be used at some time), the jury would be required, among other things, to predict what action would be taken in the future by the leaders of the Communist Party, and how long it would take, under changing conditions, to organize a sufficient number of party members in Georgia and the other Southern states, to justify an attempt to put the party program into effect. To reach such a conclusion, they would be required to imagine different communities, both in Georgia and elsewhere, and the trajectory of the defendant's influence in such hypothetical communities. Common experience would supply no guide; the result of the jury's speculation would necessarily be arrived at through bias and prejudice and not through an appraisal of known facts in the light of common experience. Statutes containing standards so indefinite and failing to give fair warning of their scope violate the due process

clause. It is particularly important that a statute limiting free exercise of constitutional rights on penalty of death, should contain a fair warning of its scope, and the very indefiniteness of the present statute is in itself sufficient to condemn it as an unreasonable limitation upon the exercise of constitutional rights.

ARGUMENT.

POINT I.

Section 56 of the Georgia Penal Code, as construed and applied by the Supreme Court of Georgia, unreasonably restricts freedom of speech and of assembly and is, therefore, invalid under the due process clause of the Fourteenth Amendment.

A. *The application of the Statute is invalid because there is no evidence that appellant advocated or attempted to induce others to resort to force or to engage in acts of violence.*

Freedom of speech and of assembly are comprehended within the "liberty" guaranteed by the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Hamilton* v. *Regents*, 293 U. S. 245; *Grosjean* v. *American Press Company*, 297 U. S. 233; *DeJonge* v. *Oregon*, No. 123, October Term, 1936, decided January 4, 1937.

It is clear that a State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means or the organization of a group

to further such advocacy. *Fiske* v. *Kansas, supra.* It is also clear that a State may not make the act of conducting, attending or speaking at a peaceful meeting, with a lawful purpose, a crime regardless of the purposes of the organization calling the meeting. *DeJonge* v. *Oregon, supra.* A statute which is construed and applied so as to render such behavior criminal violates the Fourteenth Amendment for the application of the Statute affirms its validity as so applied. *Fiske* v. *Kansas, supra,* pages 385, 386; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288-289. This Court, in determining the nature of the situation to which the statute has been construed to apply, will accordingly consider whether there is any evidence to support the conclusions of fact of the State Court. *Fiske* v. *Kansas, supra.*

The evidence, upon the basis of which appellant was convicted and his conviction affirmed, consisted of the testimony of three witnesses and certain documents, some of which related to the Communist Party. The witnesses were Watson, the arresting officer (R., 11-13; 14-15), Clonts, a clerk in the postoffice[1] (R., 13-14) and Assistant Solicitor General Stephens (R., 15-23). According to Watson's testimony, some of the documents were found in a box under appellant's arm at the time of his arrest without a warrant while opening his mail box in the Federal postoffice Building in Atlanta[2]; and the remainder of the documents were

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[1]Clonts' testimony was limited to the identification of appellant as the lessee of the postoffice box which he was opening at the time of his arrest.

[2]Upon instructions of Assistant Solicitor General Stephens the police had been lying in wait for anyone who came to the box because a Commissioner had complained about receiving a "scurrilous" letter bearing the box number (R., 15). The alleged letter was never offered in evidence nor were its contents divulged. Two circular letters bearing the box number do, however, appear in the record. See documents 30 and 31, R., 83-86.

found in his room when, following the arrest, it was searched without a warrant (R., 11, 12).

Both Watson and Stephens testified that appellant, a young Negro, stated after his arrest and in response to their interrogation, that he had been sent to Atlanta as an "organizer" for the Communist Party (R., 12, 16-17). Stephens testified that appellant stated that he was paid $10.00 a week for his work as "organizer", that his duties were "to call meetings, educate or disseminate information regarding the Party at these meetings, to distribute literature, to secure members for the meetings and generally to work up an organization of the Communist Party in Atlanta" (R., 16), that he held or had attended two or three meetings and that "his organization • • • at that time had only five or six active workers" (R., 19) or "actual members" (R., 17), that the "documents and things" found in his room "were sent to him from the headquarters of the Communist Party in New York" (R., 12), that he was the author of one or two of the documents in evidence (Nos. 30 and 31, R., 83-86) which concerned unemployment relief and unemployment insurance, that he had distributed copies of these two documents which were characterized by the court below on appeal from the judgment of conviction as "of a more or less harmless character" and not "of any considerable importance within themselves" (178 Ga. 832, 856, 857). At the trial appellant made an unsworn statement to the Court (R., 25-33) in which he set forth, among other things, his belief as to the real reason for his arrest[1]. He referred to his work with the "Unemployment Committee" of Atlanta in organ-

[1]In the middle of June, 1932, relief agencies in the City Government of Atlanta had stopped furnishing relief (R., 25-26). The Unemployed Council of Atlanta, connected with the Unemployed Committees of the United States, of which appellant was a member, followed the policy of its affiliate in organizing the impecunious

(*Footnote continued on next page.*)

izing the Negroes and whites together for protest against conditions of unemployment and in support of adequate unemployment relief and unemployment insurance. Although in the course of his statement he expressed his judgment that "the system we are living under is on the verge of collapse" and that the unemployed have a right to demand food and shelter from the Government, nothing in the statement indicated that he had urged the unemployed or anyone else to resist the authority of the State or otherwise to resort to violence. Thus the relevant testimonial evidence consisted entirely of appellant's admissions. At the most, it permitted a finding that he had come to Atlanta in the interests of the Communist Party, had held a few meetings and had in his possession at the time of his arrest certain documents. The balance of the State's evidence consisted of the remaining documents seized by the police officers. Thirteen of these documents were mentioned in the opinion of the Supreme Court of Georgia (178 Ga. 832, 858-866) and may therefore be assumed to have influenced its judgment particularly. Nine of these thirteen were membership books in the Communist Party (Nos. 3-11, R., 47-55). The remaining four documents were "The Communist Position on the Negro Question" (No. 13, R., 60-69), "An Appeal to Southern Young Workers" (No. 16, R., 71-72), "Party Organizer" (No.

(*Footnote continued from previous page.*)

black and white workers so that they might make a united appeal for relief. The Unemployed Council issued leaflets (Documents 30 and 31, R., 83-86). This followed a statement of the County Commissioners that no one was starving in Atlanta. The meeting was held to show that the people who attended, both Negro and white, were half naked and starving (R., 27-28). Some of the white workers were permitted to come into the courthouse to see the County Commissioners, but the Negroes were excluded (R., 27). Although the County Commissioners had previously stated that they had no funds available for relief, they voted $6,000 for unemployment relief on the day after the demonstration (R., 28).

17, R., 72) and a book entitled "Communism and Christianism" (No. 15, R., 70-1, 73-4).

FIRST.—Whatever the character of these documents, there is no evidence in the record sufficient to sustain a finding that appellant had personally advocated forcible overthrow of the State Government or other acts of violence, for there was no evidence that appellant had distributed any of the documents except the two which were characterized as "more or less harmless" by the court below, as indeed they were. There is no evidence that appellant possessed any particular documents other than those referred to above in quantity sufficient for distribution[1]. There is no evidence that he had read any of these documents or showed them to anyone. It appears affirmatively that several of the documents were books which appellant apparently possessed for his own reading and obviously could not have undertaken to distribute[2].

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[1]While Watson referred in a portion of his testimony containing his identification of the documents as found in the box under appellant's arm or in his room to several "batches" of newspapers, in particular the "Daily Worker", the "Liberator" and "Young Worker" there was no indication that the various copies were all of the same issue rather than single copies of successive issues and in any event these documents were not relied upon by the Court below in sustaining the application of the statute and the conviction (R., 20-22).

[2]Due to an apparent error in preparing the original bill of exceptions, the introduction to the brief of documentary evidence states that all the documentary evidence referred to in the brief (R., 47) was in a box under appellant's arm at the time of his arrest. This is inconsistent with Watson's identifying testimony (R., 12, 20-3) which fails to distinguish specifically between all of the documents found in the box and in appellant's room. Moreover, it is apparent from a comparison of the testimony with the brief of documentary evidence and the motion for new trial, that it was physically impossible for all of the documents to have been contained in a small box under appellant's arm at the time of his arrest.

There was no testimony as to the character of the two or three meetings which appellant admitted holding, as to the nature of the discussions which occurred at those meetings or the extent of appellant's personal participation in them. Both Watson and Stephens denied that they had any knowledge of appellant or his activity, life and work other than that derived from his own statement to them (R., 13, 19, 20). They had never seen him prior to his arrest (R., 12, 15). The only evidence in the record which may be thought to bear upon the probable character of those meetings consists of the minutes of what purported to be a meeting of the "Section Committee" and two meetings of the "Foster and Ford Clubs" (Nos. 20, 21, 26, R., 75-76, 78-79). These minutes, in so far as they indicate anything, indicate that the meetings were lawful in nature and in purpose and that the parties attending the meetings were concerned about such matters as the relief of unemployment and the organization of the unemployed for articulate protest against the condition in which they found themselves.

Appellant's own unsworn statement at his trial, which was relied upon by the Court below to sustain the conviction (178 Ga. 832, 866-867) indicates nothing to the contrary. It refers to his activity in the work of the "Unemployed Committee" in organizing the protest of unemployed workers, which resulted in a grant of $6,000 for unemployment relief. There is no foundation for the inference which the Court below held permissible that in actively espousing "the cause of the unemployed" appellant was in fact engaged in advocating violence or insurrection. That appellant's activity with the unemployed was peaceful in character is further indicated by the "more or less harmless" circulars which appellant admitted distributing in support of the protest against the curtailment of relief. Nor is there any significance in appellant's statement at the trial that he believed "the system we are living under

is on the verge of collapse". There is not the slightest evidence that he or anyone else under his influence had advocated that the collapse which he thought impending should be utilized as an opportunity to overthrow the Government or forcibly resist its authority. So far as the statement throws any light on appellant's activity and state of mind, it seems to us more consistent to assume that he thought existing conditions favorable to peaceable organization of the unemployed. The pessimistic view of conditions existing at the time, which appellant voiced, was too frequently repeated by respected and peaceable citizens in this country and elsewhere to warrant the conclusion that expression of the view implies an intent to participate in or to urge others to participate in the overthrow of democratic institutions by force. Moreover, even if appellant's statement justified the inference which the Court below held to be permissible that he believed "the conditions were opportune for revolution", it does not justify the inference that he did anything to achieve that result. Appellant's statement to the jury thus contained nothing to support the judgment of conviction, although quite conceivably such a statement by a Negro, particularly one from another State who entertained unpopular views, may have inflamed the local prejudice of the white jury by reference to irrelevant matters such as the treatment of the unemployed and conditions in the local jail.

SECOND.—Even if it might be inferred from appellant's mere possession of literature relating to the Communist Party that he was familiar with all its contents, and that he was attempting to persuade others to do all the things which were stated to be desirable in the documents, the evidence is insufficient to permit the conclusion that appellant personally advocated forcible overthrow of the State Government or other acts of violence.

In appraising the documentary evidence it is, of course, necessary to read the documents as a whole and not to wrench words or phrases from their context and thus achieve a false emphasis unjustified by their setting. This principle, to be applied in considering this documentary matter, is the familiar one applied in criminal and civil libel actions, in slander actions and prosecutions for obscenity, which requires writings and utterances to be construed as a whole. See *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd); *United States* v. *Dennett*, 39 F. (2d) 564 (C. C. A. 2nd); *Dupont Engineering Co.* v. *Nashville Banner Publishing Co.*, 13 F. (2d) 186, 189 (D. C., M. D., Tenn.); *Commercial Pub. Co.* v. *Smith*, 149 Fed. 704, 706 (C. C. A. 6th); *Halsey* v. *New York Society*, 234 N. Y. 1, 4; *Klaw* v. *New York Press Co., Ltd.*, 137 App. Div. 686, 688; *Daniel* v. *Moncure*, 58 Mont. 193, 200; *Flaks* v. *Clark*, 143 Md. 377, 382; *Stevens* v. *Storke*, 191 Cal. 329, 334; *Moore* v. *Booth*, 216 Mich. 653, 656; see also the dissenting opinion in *Schaefer* v. *United States*, 251 U. S. 466, 483. Furthermore, proper judgment upon the true meaning of the documents requires recognition of their generic relationship to American political tracts, which traditionally contain rhetoric and overstatement which the average reader naturally discounts and usually is intended to discount.

The "Extracts from the Statutes of the Communist Party of the U. S. A." contained in the membership books found in appellant's possession (R., 49-52), outline the form of the Party organization and contain references to the importance of Party regularity and discipline. They contain no advocacy of insurrection but only quite harmless description of the Party's structure. They also contain some slight exposition of the nature and ideals of the Party. In the course of this explanation, the word "revolutionary" appears. It is also used in several of the other documents which we shall discuss, and the court below

seemed to attach special significance to it (178 Ga. 864, 7). When it is considered in its setting it is perfectly plain that the word does not imply any advocacy of force or intent to overthrow the government forcibly. It is often used in describing the Marxist theory to distinguish the principles of Marxism from more traditional economic doctrine. The word occasionally appears as a part of the phrase "proletarian revolution". This implies a change in what the Party asserts, elsewhere in the documentary evidence, to be the present distribution of political power. There is nothing to indicate that the change could not occur peacefully. Economists and historians have long described the changes in the economic system of the world effected through scientific development and the general substitution of machines for handicraft as the "industrial revolution". The changes since March 4, 1933, have sometimes been described as the "Roosevelt Revolution" (see Lindley, *"The Roosevelt Revolution"*). Such phrases carry no implication that changes thus characterized were brought about through violence. Thus, the words "revolutionary" and "revolution" in the documentary evidence in this case, can only be considered as describing a new political or economic program, without any implication that its achievement will involve force. Such words are merely symbols of important change, and, in view of the political traditions of this country, imply, at most, a substantial shifting of economic and political power as a result of lawful activity.

The original opinion of the court below quotes from a booklet entitled "The Communist Position on the Negro Question" (R., 60-9). This booklet contains excerpts from a speech delivered in 1932 in nominating a candidate for Vice-President of the United States at a lawfully held convention of the Communist Party (R., 61-2). These excerpts must, of course, be read in the light of the traditional purpose and nature of nominating speeches at national con-

ventions. The speaker for the Party (who was not appellant) demanded confiscation of lands now owned by white landowners in the so-called "Black Belt". This and the following statements of party principles are couched in the familiar language of party platforms. The statement of a "demand" at a party convention is not a call to party members to take individual or collective illegal action. It is an appeal to voters for support. Certainly "confiscation" might occur through constitutional means and the use of the word does not imply the employment of violence. If words are to be used loosely, the Eighteenth Amendment or the recent legislation affecting the gold content of the dollar might be regarded as resulting in widespread confiscation, but that was accomplished without violence. The speaker further said that the Party proposed to change State boundaries and establish State unity for the "Black Belt". There is no suggestion that this was to be done through violence. It is clear that it could be done by constitutional amendment or possibly by compact among the States affected. A further "demand" is that the Negroes are to be given the right of self-determination in the territory, the right to set up their own government, and the right to separate, if they wish, from the United States. In view of the nature and setting of this "demand", it cannot be regarded as importing or advocating the use of violence. The phrase "right of self-determination" came into general currency through its use by President Wilson, and its use connotes orderly and peaceful decision in the territories affected through plebiscites or otherwise. Peaceful exercise of that right would result in setting up a government acceptable to those exercising the right of self-determination. While our history does not afford a case in point, even secession could be accomplished peacefully unless the opposition resorted to force and so precipitated a conflict. Certainly, that eventuality must be regarded as so remote that even if it should be deemed to import

the use of force, it cannot be taken seriously as a threat to the authority of the State of Georgia. Considered in their setting, it is quite clear that the remarks quoted in the statement did not constitute advocacy of the use of violence against lawful authority.

The court below also referred to another part of the same pamphlet containing "Resolutions of the Communist International on the Negro Question in the United States" (R., 63-7). This resolution contains the same general program set forth in the nominating speech referred to above. It purported to show that the international organization of the Communist Party took the same view of the Party program for the South that had been expressed at the Party convention. No significance is to be attached to the word "revolutionary" in this statement for reasons given above. The resolution contains the following statement: "Within the limits of this State (meaning a State comprising the Black Belt) there will of course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes". There is no justification for an inference that the suggested dominance of the Negro majority over the white minority should be achieved through violence. The reference in the booklet to the fact that the change in the relation between Negroes and whites suggested, was the only possible way of carrying out the right of self-determination in a "democratic manner" shows that the emphasis is upon maintenance of democratic institutions and not upon their destruction.

The suggestion that Party members should "demand" that "no armed forces of American imperialism should remain on the territory of the Black Belt" is again a mere statement of a Party purpose consistent with the idea that its program could be carried into effect through lawful

means. The resolution further states: "Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the 'right to self-determination', but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc." We believe that this is the only statement in all of the documentary evidence from which any possible inference could be drawn that the Party program might eventually contemplate some use of force to carry it into effect. But this statement declares explicitly, not only that any actual violence is deferred, but that even the consideration of the question whether violence would ever be necessary, is premature. Where such doubts exist, and the way to peaceful action is clearly left open, it is not to be assumed that the doubts would be resolved in favor of the use of violence, and advocacy of that use by appellant, in defiance of the expressed wish of the leaders of the Party, cannot be inferred. The suggestion for mass action does not involve any forcible resistance to the authority of the State. All of the action mentioned could be carried out peacefully, and, considering the number of actual members in the State indicated by the election returns (*infra*, p. 43), even the mass action suggested would necessarily be long deferred. The resolution recognizes that "it is just possible for the Negro population of the Black Belt to win the right to self-determination during capitalism". This is a clear recognition that the demands of the Party may be achieved without any resort to force, and it negatives any possible inference that force is implied in the Party program. The conjunction of this statement with reference to "national rebellion" shows that the word "rebellion" is used in the same sense as the word "revolution" which we have discussed above, and that it does not imply the use of violence. Reference to the Party's "Bolshevik line on the Negro question" is obviously a mere characterization of the program previously stated, and adds nothing to the implications of that program.

The court below quotes from a book found in appellant's possession, entitled "Communism and Christianism" (R., 73-4). One copy of this book, which contained 247 pages, was found in appellant's room (R., 22). The book did not purport to be an official Communist publication. Furthermore, the excerpts from the book quoted by the court below (178 Ga. 865, R., 73) did not indicate that the author of the book considered that violence would be necessary to change the capitalist system. The excerpts state, in effect, that the working class must organize politically to acquire the powers of government. They indicate that a change in the political organism is necessary. The proposed change in the organism is expressed in figures taken from the activities of the husbandman, but the possible exaggeration in these figures does not change the fact that the author suggests that the changes be accomplished through political action. Many changes have been effected in the Constitution of the United States which might be described as an uprooting and replanting, if one chose to use those figurative terms. It is quite plain that the author felt that in some countries the change would not have to occur, as in Russia, through violence. The conviction can no more be sustained because the appellant had in his possession a book of this character, than if it were based upon his possession of a copy of the Encyclopedia Brittanica, which contains many descriptions of revolution and economic and political doctrine. It is not to be inferred that men advocate violence because they read, or because their reading includes modern equivalents of the radicalism of Thomas Paine.

The court below referred to a document entitled "An Appeal to Southern Young Workers" (R., 71). There is nothing in this document which incited to violence or which added anything to the documents which we have already discussed. Reference to "smashing" the National Guard, the C. M. T. C. and R. O. T. C. is, of course, not to be taken

literally. It is merely an expression in exaggerated language of a demand for the end of compulsory military training and of the maintenance of military establishments. It is part of the program of many established religious and charitable organizations. The appellant could not be properly penalized because the choice of words was inexact or even offensive. No one could reasonably suppose that the literature advocated a forcible collision with the armed forces of the State in an effort to remove them, because increase of membership and not suicide was the purpose of this Party literature. The court below considered that some of the statements necessarily imported the use of violence because in *Carr* v. *The State*, 176 Ga. 55, it had reached that conclusion in passing upon a demurrer to an indictment in which some of the phrases appearing in this literature were considered apart from their context. There was no justification for considering those phrases alone in the present case, and in their setting they do not bear that meaning.

The "Party Organizer", referred to by the court below, is not in the record (R., 72) and there is not the slightest basis for assuming that it contained any incitation to violence. Apparently only the summary appearing in the present record (R., 72) was before the court below. The court below states that "the literature fairly teems with such expressions as 'confiscation', 'revolution', 'rebellion' and 'violence' • • •" (178 Ga. 867). Careful examination of all the documentary evidence discloses no direct or indirect advocacy of violence. The only use of the word is in "Communism and Christianism", and the conviction certainly cannot be supported by anything appearing in that book, one copy of which was found in appellant's possession.

Examination of the additional documentary evidence in the record, which is not specifically mentioned in the opinion of the court below, fails to disclose any advocacy of

forcible resistance to the authority of the State of Georgia. Those documents specifically concerned with activity of groups in Georgia, reflect, as we have said, a picture of wholly peaceful organization of the unemployed. Taken as a whole, the documentary evidence can be regarded as stating only the general nature of the organization of the Communist Party and the program which it had at some earlier time favored, particularly for the Southern States. Even if appellant may be charged with the distribution of this literature or the advocacy of all the ideas contained in it, there is no justification for the conclusion that he was sounding the tocsin to violent revolt.

That the Georgia Supreme Court was not unaware of the weakness of the evidence offered in an attempt to show that appellant had advocated violence is evidenced by the reliance placed upon the proposition that the economic and political changes urged in the literature could not be accomplished without probable violent opposition, from which it was inferred that if appellant advocated such changes he must have intended that violence should be used in their support (178 Ga. 832, 867). The inference is logically questionable but even if valid it lends no support to the judgment. Possible violent reaction does not justify suppression of the expression of views which may evoke it (see *Near* v. *Minnesota*, 283 U. S. 697, 722; *New York Staats Zeitung* v. *Nolan*, 89 N. J. Eq. 387). If suppression can be justified on these grounds the constitutional protection is nullified at the point at which its importance begins. A restriction of the rights of freedom of speech and of assembly upon such grounds is a restriction of the right and not of the abuse of it (see *DeJonge* v. *Oregon*, decided January 4, 1937); the only constitutional method of dealing with the problem of probable violent opposition to the peaceful achievement of legitimate ends is to make such opposition criminal.

We believe that *Fiske* v. *Kansas*, 274 U. S. 380, requires the conclusion that the doctrine of the documents included in this record is within the domain of constitutional protection. The chief evidence offered against *Fiske* was the preamble to the constitution of the Industrial Workers of the World (set forth in Appendix A hereto). The preamble contained such expressions as: "There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life". "Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system". "It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old". Certainly there was at least as much room for implication that these doctrines required the use of violence as there is that the doctrines contained in the documentary evidence in this case did. Nevertheless, this Court declined to accept the conclusion of the Supreme Court of Kansas that advocacy of violence could be inferred and decided that the court and jury were not warranted in drawing an inference that the document advocated achievement of the program through forcible and unlawful means. We believe that the case governs the decision here upon this point, and that even if the documents are taken as evidence of doctrines advocated by the appellant in person or by the Communist Party, the conviction cannot be sustained.

Nor can the application of the Statute be sustained even if the evidence suffices to permit the inference that the appellant conducted meetings under the auspices of the

Communist Party or distributed literature published under its auspices, and this whatever the character of the Party may be. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the constitution protects". *DeJonge* v. *Oregon*, decided January 4, 1937. By the same token, the question is not as to the auspices under which literature distributed is published, but as to its contents; not as to the relations of the distributor, but as to whether the literature contains statements attributable to appellant which transcend the limits of constitutional protection.

THIRD.—The judgment cannot be sustained merely upon the ground that the evidence was sufficient to permit the conclusion that appellant came to Atlanta with the purpose of attempting to obtain members for the Communist Party, or, if the record is to be read as if it were the fact, upon the ground that he did obtain several members while he was there. The only evidence as to the character of the Communist Party consisted of the documents referred to above, some of which purported to contain statements of the Party's purposes. The record contains, however, no authentication of the official character of these documents, nor any showing that, if official, they represented present Party doctrine. Moreover, there was nothing in the documents, as we have shown above, to prove that the advocacy of forcible insurrection or other acts of violence were comprehended within the purposes of the Party. Accordingly, even if a State may, consistently with the due process clause of the Fourteenth Amendment, make it a crime to attempt to obtain members for an organization, which includes among its purposes the advocacy of force and violence in the achievement of its ends, appellant's conviction

cannot be sustained upon that ground. Moreover, he was neither indicted nor convicted merely upon the ground that he had attempted to obtain members for an organization, the purposes of which included the advocacy of violent insurrection. He was indicted and convicted and his conviction was sustained upon the theory that he personally had advocated such violence in Fulton County, Georgia. Something more would therefore be necessary in order to sustain the conviction than proof that the organization itself was unlawful in character. It would be necessary at least to show that in soliciting members appellant himself had subscribed to and advocated the unlawful purposes of the organization. There was, as we have stated above, no evidence sufficient to warrant the conclusion that he did so. In the light of the affirmative evidence as to the peaceful and lawful character of appellant's activities with the unemployment committee, we submit that it cannot be inferred that in attempting to obtain members for the Communist Party in Georgia, appellant personally advocated the use of force to obtain the party ends. Rather does the record require the conclusion that if appellant was engaged in endeavoring to increase the membership of the Communist Party, his purpose was to increase its political power to the end that the party program might be peacefully achieved.

B. *The Statute is invalid as construed and applied because it does not require either that there be advocacy of violence in the immediately near future or that the words used be of such a nature and that they be used in such circumstances as to create a "clear and present danger" of bringing the prohibited result to pass.*

As Section 56 of the Penal Code of Georgia was construed by the court below in its opinion upon rehearing (*supra*, p. 4) it makes criminal any effort to induce

others to combine in forcible resistance to the authority of the State, however remote the time when the suggested force is to be used, if the contemplated length of time is such "that he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce". It is immaterial whether force is actually employed in the particular case, whether there was intent or inducement that it should be employed immediately or in the near future or whether there was any genuine probability that it would be employed at all. The statute, as construed by the Court below, requires only that the defendant must have intended that those whom he attempted to persuade should resort to forcible resistance at a time "within which he might reasonably expect his influence to continue to be directly operative" in causing them to do so. Advocacy of forcible resistance is thus made criminal, however remote the time when force is to be used, if the defendant might reasonably expect his persuasion to have some part in its eventual occurrence. Not only is there no requirement of a clear and present danger to the authority of the State arising from a defendant's conduct or from the behavior which he advocates, but there is no necessity that there be any danger whatever.

As thus construed, the statute is clearly void under the test adopted by this Court in *Schenck* v. *United States*, 249 U. S. 47, to define the maximum limitation on freedom of speech permissible under the First Amendment. In that case the Court considered the validity of the Espionage Act of June 15, 1917 (40 Stat. 217) and of its application. Recognizing the power of Congress, through the exercise of its war powers, to prevent the substantive evils which might be brought about by unabridged freedom of speech or of the press during the progress of the War (and that limitations upon these liberties, necessary in time of war, might not be permissible in time of peace) the Court said (p. 52):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

We contend that this test should be applied to the present statute under the Fourteenth Amendment, and that, if applied, the statute is necessarily invalid.

The right of the States to protect themselves against direct "incitements" to acts of violence and against conduct which creates grave danger that the government will be overthrown by force, is beyond question. *Near* v. *Minnesota, supra,* at page 716. But as this Court observed in *DeJonge* v. *Oregon,* decided January 4, 1937, "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means". The permissible scope of the exercise of the right of the State to prevent violence must be measured by the same tests which are applied in determining the validity of other statutes having legitimate ends, that is that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objects sought to be attained" (See *Nebbia* v. *New York,* 291 U. S. 502, 525; *Meyer* v. *Nebraska,* 262 U. S. 390, 400; *Whitney* v. *California, supra,* p. 371). Limitations upon the liberty of expression and of assembly have been recognized only in exceptional cases. *Near* v. *Minnesota, supra,* page 716. We maintain that in limiting the liberty

of speech and of assembly guaranteed by the Fourteenth Amendment beyond the point permitted by the test laid down in the *Schenck* case, the present statute is so unreasonable and arbitrary as to violate the Fourteenth Amendment. To brand as an "incitement" and condemn all advocacy of change which may be deemed to involve the use of force at some indefinite future time, is a means far better adapted to eliminating the formation of all assemblies for political discussion than to protecting the State against violence. So unnecessarily extensive an infringement of freedom is unreasonable as a means of deterring violence. Moreover, when the avoidance of violence is so exalted at the expense of freedom of expression, there is room for doubt whether the true end of the statute was not the suppression of freedom, which is not a permissible end.

The test laid down in the *Schenck* case reconciles the right of the State to protect itself against violence and the right of the individual to free political discussion and organization, and prevents improper abridgement of either right.[1] The test is a practicable and workable one; it is easy for courts and juries to apply. Other possible tests extending the right of the State beyond protecting itself against the advocacy or threat of immediate violence end in vague but dangerous trespasses upon liberties guaranteed by the Constitution.

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[1]The principle is analogous to that found in the common law of attempts to mark the point at which the danger of violence has been thought to outweigh the danger of trying "the thought of man". See *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272; *Swift and Company* v. *United States*, 196 U. S. 375, 396; Beale, *Criminal Attempts*, 16 Harv. L. Rev. 491; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821. If there is imperfection in the analogy, it springs from the inestimably greater danger to a democracy in curtailing the political freedom at which the present statute is directed than in the limitation of freedom involved in punishing an incipient attempt to commit a common crime.

The constitutional justification for the test of the *Schenck* case was well stated by Mr. Justice Brandeis in his concurring opinion (with Mr. Justice Holmes) in *Whitney* v. *California, supra,* at pages 376-377:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. • • • In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. *To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.* Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my

opinion, is the command of the Constitution." (Italics ours.)

Another statement of the reason for the "clear and present danger" rule is contained in the dissenting opinion of Mr. Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 627-31:

> "• • • the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. • • • It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. • • • But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. • • • While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. • • • Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"

The continued vitality of the decision in the *Schenck* case, and the test there laid down, do not seem to us to have been substantially affected by subsequent decisions of this Court. Its authority was recognized in all of the later cases arising under the Espionage Act. See *Debs* v. *United States,* 249 U. S. 211; *Frohwerk* v. *United States,* 249 U. S. 204; *Abrams* v. *United States, supra; Schaefer* v. *United States,* 251 U. S. 466; *Pierce* v. *United States,* 252 U. S. 239, and cf. *Gilbert* v. *Minnesota,* 254 U. S. 325.

While in some of these cases the Court stated the rule to be applied, in appraising the evidence upon which conviction was based, in somewhat different words from those used in stating the test in the *Schenck* case, its continued authority was recognized and no attempt was made to limit the application of the test which it lays down. Dissents in some of these cases showed division upon the application of the Espionage Act to the facts in the particular cases, with possibly some apprehension on the part of the dissenting Justices that, in the application in the particular cases, the test of the *Schenck* case was not being applied as rigorously as it should be. But nothing explicitly said or held in those cases gives reason to doubt its continued recognition by the Court. Cases arising under the Espionage Act dealt with conduct occurring during the supreme emergency of war, and the Court recognized in the *Schenck* case as it has since (see *United States* v. *Macintosh,* 283 U. S. 605, 622; *Near* v. *Minnesota, supra,* at p. 716), that the exigencies of war may justify restrictions of freedom which would be intolerable in time of peace.

Gitlow v. *New York,* 268 U. S. 652, *supra,* and *Whitney* v. *California,* 274 U. S. 357, *supra,* somewhat limited the application of the test laid down in the *Schenck* case but otherwise they left it unimpaired. In the *Gitlow* case the Court considered the validity of the New York Criminal Anarchy Act (New York Laws of 1909, Ch. 88; New York Consolidated Laws, 1909, Ch. 40, originally passed in New

York Laws of 1902, Ch. 371) as construed and applied to the facts of that case. The statute defined with particularity the nature of the doctrine, advocacy of which was denounced. In the absence of any showing that the Court should not apply the familiar presumption of the existence of facts which would support the statute, the Court relied upon the legislative determination that advocacy of the defined doctrine involved grave danger to the safety of the State; accordingly, it sustained the validity of the statute and found that there was adequate evidence to justify its application. The Court pointed out the difference between a statute of that kind and one which merely prohibited certain acts involving the danger of substantive evil, saying (pp. 670-671):

> "It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an *original question,* without any previous determination by the legislative body, whether *the specific language used* involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." (Italics ours.)

The Court for the first time declared that the test laid down in the *Schenck* case was intended to apply only to cases where the statute did not involve a previous valid determination by the legislative body as to the evil consequences of the advocacy of a doctrine. The minority (Mr

Justice Brandeis and Mr. Justice Holmes) did not concur in the distinction made by the majority as to the scope of the application of the "clear and present danger" test.

Similarly, in *Whitney* v. *California, supra*, the Court upheld the California Criminal Syndicalism Act (California Statutes, 1919, c. 188, p. 281), which meticulously defined criminal syndicalism and denounced the formation and participation in the work of organizations advocating criminal syndicalism. The legislature had expressly determined that the conduct at which the Act was aimed involved immediate danger to the public peace and security of the State. The Court also considered that there was sufficient evidence to justify application of the statute to Miss Whitney. Mr. Justice Brandeis and Mr. Justice Holmes concurred because there was some evidence which might have justified the trial court in finding the existence of a clear and present danger to the authority of the State arising from conspiracy by members of the International Workers of the World to "commit present serious crimes" and because objections urged in the Supreme Court had not been properly made below. The majority of the Court did not discuss the *Schenck* case, although by reference to the *Gitlow* case (p. 371) "and cases cited" it may perhaps be assumed that it reaffirmed its position in the *Gitlow* case with respect to the *Schenck* case.

But Section 56 of the Georgia Penal Code is plainly not of the same character as the statutes sustained in the *Gitlow* and *Whitney* cases, as to which a reasonable legislative finding of danger was held an adequate substitute for the judicial finding envisaged by the *Schenck* case. No specific doctrine is explicitly stated and condemned by the statute; what is punished is any attempt—by persuasion or otherwise—to achieve a specific result—the inducement of others to combine at some indefinite future time in forcible resistance to the authority of the State. The present statute is not one "condemning utterances identified by a

description of their meaning" (Mr. Justice Cardozo, dissenting, *Herndon* v. *Georgia*, 295 U. S. 441) but rather one like that involved in *Schenck* v. *United States, supra*, which this Court said in *Gitlow* v. *New York, supra*, pages 670-671, "merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself". Where an attempt is made to apply the provisions of such a statute "to language used by the defendant for the purpose of bringing about the prohibited results" (*Gitlow* v. *New York, supra*, pp. 670-671), this Court explicitly said in the *Gitlow* case that "it must necessarily be found as an original question, without any previous determination by the legislature, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection" (*Gitlow* v. *New York, supra*, p. 671). The inquiry which this Court thus held to be essential is precisely the one which the statute as construed by the highest court of the State renders immaterial.

Moreover, even were the present statute regarded as having the same character as those involved in the *Gitlow* and *Whitney* cases, it cannot be considered as supported by a legislative finding such as that which this Court treated as adequate in those cases. The New York statute was passed in 1902 after the assassination of President McKinley by an anarchist. It was applied in a period of post-war emergency, when feelings were aroused and revolutionary stirrings were felt throughout the world, to the advocacy of doctrine of the same general kind as that found by the Legislature to constitute a menace to the stability of the State (cf. the majority and dissenting opinions in *People* v. *Gitlow*, 234 N. Y. 132). At the time of Gitlow's indictment, the Legislature not only continued to recognize the existing danger of the substantive evil denounced in the statute, but it was earnestly considering further legis-

lation of the same general character.[1] The record contained no evidence rebutting the legislative finding; the finding was not rebutted by any facts within the range of judicial notice.

The California statute upheld in the *Whitney* case, *supra*, contained the following provision:

> "Sec. 4. Inasmuch as this Act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this State advocating, teaching and practising criminal syndicalism, this Act shall take effect upon approval by the Governor." (California Statutes,

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[1]At about the same time, the New York Legislature, by concurrent resolutions, provided for a committee to investigate seditious activities. The preamble to the resolution contained the following:

> "WHEREAS, it is a matter of public knowledge that there is a large number of persons within the State of New York engaged in circulating propaganda calculated to set in motion forces to overthrow the government of this State and the United States, and
>
> WHEREAS, sufficient facts were adduced by the sub-committee of the Senate of the United States investigating this subject during the last session of Congress, to indicate the necessity of further inquiry and action, and
>
> WHEREAS, it is the duty of the Legislature of the State of New York to learn the whole truth regarding these seditious activities, and to pass, when such truth is ascertained, such legislation as may be necessary to protect the government of the State and to insure the maintenance of the rights of its citizens, * * *." (See *Revolutionary Radicalism*, The Report of the Joint Legislative Committee Investigating Seditious Activities, filed April 24, 1920, in the Senate of the State of New York, 4 vols.)

1919, Ch. 188, p. 282; see concurring opinion of Brandeis, J., in *Whitney* v. *California, supra*, p. 378.)

Thus, the decisions in the *Gitlow* and *Whitney* cases rest in effect upon the presumption of constitutionality, but this presumption is that the facts are such that the legislation is reasonable and it may be rebutted by showing that the facts are otherwise (*Borden Co.* v. *Baldwin*, 293 U. S. 194, 209; *Pacific States Co.* v. *White*, 296 U. S. 176, 185). In the *Gitlow* and *Whitney* cases, the Court found nothing to indicate that the conditions at the time of the application of the Statute differed essentially from those at the time of its enactment and the normal presumption was that they did not. But historical knowledge within the range of judicial notice suffices to establish such complete disparity between conditions in Georgia at the time of the passage of Section 56 of the Penal Code and at the time of its application to appellant that if any presumption of constitutionality arises in the instant case it is effectively rebutted.

Section 56 of the Penal Code of Georgia was passed in 1866, an adaptation of a statute directed against the fomenting of insurrection among slaves which goes back to 1804 (See the Act of May 19, 1804, Clayton, *Compilation of the Laws of Georgia*, 1800-1810, p. 178, No. 132; *Georgia Penal Code* [1817], Div. III, §4). With one possible exception, the statute was not invoked from 1866 until shortly before it was resurrected in the present case to prevent discharge of appellant from custody following the admonition of a court on a *habeas corpus* hearing that appellant would be discharged unless he were indicted (R., 29). We have traced in an appendix (Appendix B, pp. 57-73) the history and background of the present statute and its predecessors. That history shows that the predecessors of the statute were aimed at the government of a slave population and the statute itself was aimed at the almost anarchical conditions pre-

vailing in Georgia immediately following the War between the States and during the early years of reconstruction. The conditions at which it was aimed disappeared soon after the end of the war, and a quiet and peaceful relation has continued between the citizens of the State ever since. It cannot be considered that the Legislature determined in 1866 that activities such as those in which petitioner was engaged or doctrines such as those contained in the literature in the record presented a present danger of substantive evil which the State may prevent. The long period of disuse of the statute is in itself evidence of the disappearance of the conditions at which it was directed, and of the fact that no one regarded it as properly designed to fit others. Its continued presence on the statute books can give rise to no presumption in its favor which makes it applicable to an entirely new and unforeseen type of activity.

Facts of which the Court can take judicial notice show that the sovereignty of Georgia is secure. Indeed counsel for the appellee will undoubtedly concede here (as he has throughout the case) that the sovereignty of the State has never been threatened by appellant or the Communist Party. Appellant testified that there were only five or six actual members of the Communist Party in Atlanta. In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia, and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate. In 1920 there was no Communist candidate. Certainly there was no clear and present danger to the authority of the State arising from petitioner's activities or those of others. The present record demonstrates that the doctrine advocated in the literature found in petitioner's possession did not give reasonable grounds to fear violence against the State, much less its violent overthrow. In these circumstances, it cannot reasonably be believed that, in Georgia, "the inci-

dence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion" (See concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California, supra,* p. 377).

Accordingly, the present statute is invalid if measured by the test in *Schenck* v. *United States, supra,* which we contend is still the measure of the validity of statutes of the type involved in this case. It is also invalid, if measured by the test employed in the *Gitlow* and *Whitney* cases to determine the validity of statutes "condemning utterances identified by a description of their meaning".

C. *Assuming that the evidence permitted a finding that force was advocated, the application of the Statute is nevertheless invalid.*

Even if the evidence permitted a finding that force was advocated either by appellee personally or by the Communist Party, the application of the Statute is nevertheless invalid because there is no evidence of advocacy of the use of force in the reasonably near future. The merit of this contention is not dependent upon the validity of the argument immediately preceding with respect to the present vitality of the "clear and present danger" test enunciated in *Schenck* v. *United States, supra.* Should this Court hold that in condemning the advocacy of the use of force, a State is not required by the Constitution to limit its prohibition to the advocacy of immediate force, or to the advocacy of force under circumstances presenting a present danger that unlawful acts will result, it nevertheless does not follow that there are no limitations upon the extent of the permissible prohibition. It is reasonable to suppose, for example, that if a State attempted to make criminal the advocacy of forcible revolution a century or half a century or even a quarter of a century from now, the statute would be condemned on the ground that legislation designed to safeguard against violence must address

itself to the present and not to the utterly remote future.[1] Hence, it must at least be necessary to consider in each case whether the time at which it is advocated that force should be employed is within the reasonably near future. Unless it is, the advocacy presents no evil and therefore cannot be regarded as an abuse of the right of free speech with which the State may attempt to cope. There is nothing to the contrary either in *Gitlow* v. *New York* or in *Whitney* v. *California, supra.* In both cases the doctrine to which constitutional protection was denied was addressed to the present. Gitlow was found responsible for

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[1]For example, it would hardly be contended that a State could constitutionally punish the utterance of such views as are contained in the following remarks by Thomas Jefferson (in a letter from Paris to Colonel Smith, dated November 13, 1787):

> "Where did it [anarchy] ever exist, except in the single instance of Massachusetts? And can history produce an instance of rebellion so honorably conducted? I say nothing of its motives. They were founded in ignorance, not wickedness. God forbid we should ever be twenty years without such a rebellion. The people cannot be all, and always, well informed. The part which is wrong will be discontented, in proportion to the importance of the facts they misconceive. If they remain quiet under such misconceptions, it is a lethargy, the forerunner of death to the public liberty. We have had thirteen States independent for eleven years. There has been one rebellion. That comes to one rebellion in a century and a half, for each State. What country before, ever existed a century and a half without a rebellion? And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants. It is its natural manure. * * *"

a "manifesto", an incitement to his contemporaries to prepare for violent revolt. Miss Whitney was held to have assisted in the organization of a party which had for its immediate program "carrying on a revolutionary class struggle by criminal methods" (See *DeJonge* v. *Oregon*, decided January 4, 1937).

Our previous discussion of the evidence in this case indicates, we believe, that there is no basis here for a finding that force was advocated in the reasonably near future, if it was advocated at all.[1] Accordingly, we contend that without regard to the contentions heretofore advanced, the application of the Statute is invalid under the Fourteenth Amendment.

POINT II.

Section 56 of the Georgia Penal Code as construed and applied by the Supreme Court of Georgia prescribes a standard of guilt which is so vague and indefinite that it is not susceptible of reasonable ascertainment and application and is therefore invalid under the due process clause of the Fourteenth Amendment.

After holding that the statute under attack does not require that forcible resistance to the authority of the State should follow immediately or at any given time, the court below in its opinion upon petition for rehearing interpreted the statute to apply:

> "• • • if he intended that it (an insurrection) should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (179 Ga. 600).

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[1]For an analysis of the remoteness of the possibility of action, if any, indicated by the evidence, see *infra*, pages 48-9, and the discussion of the documentary evidence, *supra*, pages 15-28.

The Superior Court held that the statute, thus construed and applied, embodies a standard of liability so indefinite that it contravenes the due process clause of the Fourteenth Amendment. We contend that its decision was correct.

The construction of the statute to require that the insurrection, which need neither have occurred nor have been imminent, should be "intended to happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" constitutes "an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time • • • a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea" (Mr. Justice Cardozo dissenting, *Herndon* v. *Georgia*, 295 U. S. 454).

A jury would be authorized to convict if it found that the defendant intended that forcible resistance to the State's authority should occur at some time (however remote), provided only that the jury felt that the defendant might reasonably have believed that his influence would at that time be directly operative in causing the forcible resistance. Proof that an alleged offender did, in fact, believe that his efforts would cause forcible resistance to the State's authority, would not be required; it would be enough if the jury could be persuaded that the defendant favored forcible resistance at some time and that he might reasonably have believed that his activities would have some influence in bringing it about.

The question whether a defendant might reasonably believe that his words would have some effect in causing an insurrection at some indefinite future time, is imponderable and unreal, as the present case shows. Assuming, for the present purpose that the appellant intended that, if necessary, forcible resistance to the authority of the State should be used at some undetermined time to put into effect the program of the Communist Party in Georgia, what

factors could be considered in estimating whether that indeterminate time would be within what appellant might reasonably believe to be the trajectory of his influence? The decision of a national or international political party whether and when to resort to violence, would presumably be dependent upon its leaders throughout the years to come; the resolution of its leaders would, in turn, be dependent, it may be assumed, upon the success of the Party organization in Georgia and elsewhere,[1] and the success of Party organization would be dependent upon changes in community opinion throughout the country that would be inconceivable without a complete transformation of the patterns of our national life. The question, in short, calls for

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[1]The program of the Communist Party set forth in some of the documentary evidence is a program for what it calls the "Black Belt". Reference to "The Communist Position on the Negro Question", No. 13 (R., 60), shows that the "Black Belt" includes parts of all of the Southern States. Thus action in any particular State would obviously depend upon the success of Party organization in all of the other States composing the "Black Belt". In order to prophesy how soon that organization would reach a point where the leaders of the Party would be likely to attempt to put the program into effect, it would be necessary not only for the jurors to imagine the community with which they were familiar in a different condition, but also to imagine fundamental changes in other communities, with the present conditions of which it is unlikely that they were familiar. Even in their own community, it would be necessary for them to speculate upon the length of time required to increase Party membership from the five or six members which appellant stated there were in Atlanta, and the apparently small number of Party members in the entire State to a number which the leaders of the Party would deem sufficient for effective action. Whether the Party leadership would wait until there were five hundred, a thousand, ten thousand or a hundred thousand members in Georgia (and a like number in other nearby States) would have to be determined, and there is no possible basis upon which it could be.

speculation upon the effect of unknown forces in a hypothetical community of the future; it cannot be answered by knowledge derived either from common experience or special study; it cannot be answered by the wisdom of the politically sagacious. If a jury is nevertheless permitted to answer it, bias and prejudice are the only standards it can employ.

The uncertainty in making such an estimate may be relatively unimportant in cases where the conduct advocated is such that the hiatus between utterance and action is very short. In such cases, common experience of men's responses may furnish some guide. But where that is not the case, where the trajectory of an idea calling for action by large numbers of people may extend into the indefinite future, as the court below seems to have conceded to be true in the instant case, neither juries nor trained experts can have the knowledge necessary to measure its length. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, this Court observed that while it "is easy to put simple cases" the case before the Court was complex and "the law must be judged by it" (Cf. *Stromberg* v. *California*, *supra*). The period during which persuasion may remain effective, during which men will march to the measure of another man's thought, is in a case like the present not only completely outside the experience of ordinary men; it is entirely within the realm of the unknown and the unknowable. A jury is nevertheless left free to speculate about a question which it cannot answer and, upon the product of its speculation to award judgment of death.

A statute which requires for its application the answer to so imperfect a question contains a standard of liability which necessarily renders it invalid under the due process clause of the Fourteenth Amendment. In *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, a case involving prosecution under an Act of Congress, this Court reaffirmed the rule that penal statutes cannot be sustained when

they fail to afford a definite standard for the guidance of the court and jury in ascertaining guilt or innocence. In declaring the statute unconstitutional this Court, in words applicable to the statute under consideration, said (pp. 89-91):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. • • •
>
> That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question."

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, *supra*, this Court held invalid a Kentucky statute aimed at monopolistic price-fixing which made criminal the controlling of the price of goods so as to sell them above their real value, which was construed to mean market value under fair competition and under normal market conditions. The Court recognized that this statute required the jury to fix real value by reference to an imaginary world in which monopoly was eliminated and fair competition was assumed to exist. In holding the statute unconstitutional this Court said (p. 223):

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts."

The difficulties of imagining a tobacco market in Kentucky under free competition seem to us less great than the difficulties of imagining the changes in the community life of Georgia and its neighboring States and the decisions which would be made by leaders of the Communist Party, preliminary to a prediction of what effect appellant might reasonably have expected his influence to have as future events unfolded. Due process denies clairvoyance so large a part.

Many other cases establish that statutes which, in effect, leave to courts or juries the power to declare an act a crime without containing, in themselves, any reasonable test for discovering whether the particular act was intended to be proscribed, are void. See *Connally* v. *General Construction Co.*, 269 U. S. 385; *Louisville & Nashville R. R.* v. *Railroad Commission of Tennessee*, 19 Fed. 679 (C. C., M. D., Tenn.); *Tozer* v. *United States*, 52 Fed. 917 (C. C., E. D., Mo.); *State* v. *Parker*, 183 Minn. 588; *Louisville & N. R. Co.* v. *Commonwealth*, 99 Ky. 132; *Ex parte Jackson*, 45 Ark. 158; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443; Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831, 843, 848, containing a list of State cases declaring State statutes void for uncertainty; cf. *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51.

In the last cited case, which involved the Lever Act, Mr. Justice Cardozo, writing for the New York Court of Appeals, said at pages 54-55:

> "The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The *arbitrium boni viri*, unrestrained and undirected, becomes the test of right and wrong".

The risks incurred in violating the Lever Act were far less hazardous than those to which the appellant was subjected by the statute challenged here. The due process clause requires that criminal statutes shall be so framed that those to whom they are addressed may know what standard of conduct is intended to be required, so that men may guide their steps accordingly. See *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Tozer* v. *United States*, 52 Fed. 917, *supra; Indefinite Criteria of Definiteness in Statutes*, 45 Harv. L. Rev. 160.

In *Connally* v. *General Construction Co.*, 269 U. S. 385, *supra*, this Court, through Mr. Justice Sutherland, said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The statute under which appellant was convicted created a crime unknown to the common law. Apparently,

it had been applied only twice since its enactment in 1866. The circumstances of appellant's arrest, his incarceration and the indication that he would be discharged if not indicted, suggest that even the prosecuting authorities did not feel that the statute clearly applied to his conduct. Its elasticity of meaning is further demonstrated by its treatment by the Georgia Courts in this case. It has been construed in three different and inconsistent ways—upon the trial, in the original opinion of the court below and in its opinion upon rehearing. It has been held invalid for uncertainty by one court. None of these courts sustaining its validity has expounded its meaning beyond stating that the evidence is sufficient to justify appellant's conviction under it. Thus, the courts charged with the duty of applying the law have themselves not been free from confusion in determining its meaning. The appellant, with no prior judicial declarations to guide him; with no well-settled common law meaning to inform him (cf. *Nash* v. *United States*, 229 U. S. 373); with no well-known technical or special meanings to attach to the words, to enable him to determine how the statute would be applied; with no standard, explicit or implicit, to assist him in planning his conduct, was compelled by the vagueness of the language used to put his life in jeopardy to discover whether or not his actions constituted the crime denounced. Surrender of his right to express his views was the price of safety. None could determine in advance whether such surrender in the circumstances of the present case was the mandate of the statute.

If the validity of the statute as construed by the Court below should be sustained by this Court, it is plain that no man in Georgia can safely seek to persuade others that a fundamental change in the structure of government should be brought about at a future time by the use of force if ultimately necessary, unless he is willing to gamble his life that the jury will guess that the undetermined time when he con-

templates that force may be necessary is not included within the period in which he "might reasonably expect his influence to continue to be directly operative". In a case where there is grave danger that freedom of expression will be suppressed by the threat of a statute so elastic in circumference, the language in *McBoyle* v. *United States*, 283 U. S. 25, 27, is peculiarly applicable:

> "• • • It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

It is especially important that a statute which limits the free exercise of constitutional rights on penalty of death, in the discretion of the jury, should provide a reasonably definite rule of permissible conduct so that the citizen may know where the line is drawn and so that, being fairly on the right side of the line, he may not be deemed to have crossed it when inflamed passions rule men's decisions. If constitutional rights are to be preserved, the traps which are designed to catch those who unlawfully abuse them must at least be marked and not concealed by sign-posts so obscurely worded that no one can tell where they may lie, unless prepared to risk his life in the adventure. A statute limiting freedom of speech by a rule as indefinite as that contained in the present law, is, by reason of its indefiniteness alone, an unreasonable limitation. This Court has recently said that upon the preservation of the rights of free speech, free press and free assembly "lies the security of the Republic, the very foundation of constitutional government" (*DeJonge* v. *Oregon*, decided January 4, 1937), and (in language equally applicable to the right of free speech) a "free press stands as one of the great interpreters between the government

and the people. To allow it to be fettered is to fetter ourselves'' (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250). A limitation of the right of free speech as indefinite as that imposed by the present statute is as destructive of constitutional rights as the ''taxes on knowledge'' abhorred by the colonists and the Louisiana statute condemned by this Court in the *Grosjean* case.

CONCLUSION.

Since the statute as construed and applied by the court below violates the due process clause of the Fourteenth Amendment, it is invalid and this Court should reverse the judgments below and direct the discharge of the appellant from custody and the cancellation of his bail.

Respectfully submitted,

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APPENDIX A.

The preamble to the constitution of the Industrial Workers of the World, as it appears at page 15 of the record in *Fiske* v. *Kansas*, 274 U. S. 380, is as follows:

> "The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life (fol. 27). Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.
>
> We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.
>
> These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lock-out is on in any department thereof, thus making an injury to one an injury to all.
>
> Instead of the conservative motto, 'A fair day's wage for a fair day's work', we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system'.
>
> It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old."

APPENDIX B.

The predecessors of Section 56 of the Georgia Penal Code were aimed at activities designed to create rebellion among slaves; that was a danger of a particular kind, to be understood in the light of the history of Georgia and other States concerned by the same problem. The present statute, in substantially its present form, was passed in 1866 to deal with analogous dangers arising out of post-war conditions, and it now remains as a vestigial reminder of conditions long since banished.

Before the American Revolution, a general fear of slave insurrection was felt in practically all slave-holding colonies, especially during periods of warfare and political stress. Thus, in colonial New York, statutes were passed in 1708[1] and 1712[2] to prevent and punish slave insurrections and conspiracies. Slave scares in 1712[3] and 1741[4] led, in New York City, to the wholesale execution[5] of

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[1]I, *Colonial Laws of N. Y.*, 631 (1896 ed.). Justices of the Peace could impose death as a penalty after summary trial without a jury.

[2]I, *Col. Laws, N. Y.*, 761 (1896 ed.). Whipping was provided as the penalty for unlawful assembly of Negroes, for assaulting a white person, or for gaming. Summary trial and death was provided for murder, arson, rape, mayhem and insurrection. Whipping or fines were the penalties for whites who entertained or gave drink to Negroes.

[3]*New York City O. S. records*, 1712.

[4]*Judge Horsmanden's Account of Negro Conspiracy of* 1741-2, N. Y. 1744, 400 pages.

[5]More than fifty in New York City in 1712. In 1741 one hundred and twenty-five Negroes and two whites in New York City.

Negroes and of their white abettors, and involved the most cruel punishments.[6]

Georgia was established in 1732 by a body of philanthropists as a charitable enterprise for poor British subjects and as an English frontier.[7] Inconsistent as it may have been with the British colonial system,[8] slavery was forbidden.[9] Slavery would have been uncongenial to the system of small tenant farming which existed early in Georgia's history, and the presence of slaves would have been a source of weakness in a frontier community. Danger from Spain, from Indians and from lawless frontiersmen, made slave insurrections particularly menacing because of the ease "with which a hostile state might be able to encourage such uprisings."[10]

But pressure for slavery soon began to be exerted by the settlers themselves, and, in 1750, the Trustees passed an act allowing slaves in strictly limited numbers.[11] With the conflict between the desire for slaves and fear of the consequences of their presence, it was natural that colonial legislation should regulate slaves very carefully. In 1765, 1770 and 1773, various acts of the colonial legislature prescribed lashing as the punishment for unlawful assembly of slaves, and death without benefit of clergy for aiding runaway slaves and for the second offense of striking a white man.[12]

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[6]The stake, the rack, hanging in chains and quartering were among them.

[7]Osgood, *History of American Colonies in 18th Century*, III, 62.

[8]Osgood, *Ibid.*, III, 61 ff.

[9]*Georgia Colonial Records*, I, 31-62, 216. Acts of the Trustees.

[10]Osgood, *loc. cit.* III, 61, 62.

[11]Osgood, *loc. cit.* III, 65.

[12]*Ga. Recs.* XIX, Pt. I, pages 209-49. *Digest of Georgia Laws*, 1755-1800, Marbury & Crawford. Punishment of free Negroes by fine was provided for aiding a runaway.

Acceptance of slavery as a natural part of the economic system in Georgia followed the widespread growth of cotton cultivation after the first third of the nineteenth century.[13] Georgia forbade the slave trade by statute and in its constitution before 1800.[14] Not only slaves, but free Negroes as well, were closely regulated. Free Negroes, regarded as possible inciters of insurrection, were not encouraged to come into or stay in Georgia,[15] and no distinction was made between crimes committed by free Negroes and slaves.[16]

Against this background, the progenitor of the present insurrection law of Georgia was passed on May 19, 1804, to prevent the insurrection of slaves. Any incitement to insurrection of slaves was a felony punishable by death without benefit of clergy. The delivery and publication of

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[13]Coulter's *Short History of Georgia;* R. P. Brooks, *History of Georgia.*

[14]Statutes in 1793 and 1798. Coulter, *op. cit.*

[15]16 Ga. Hist. Quarterly 27 ff. (1932). *Free Negro Legislation in Georgia before the Civil War* contains an execellent resumé of all statutes against free Negroes. Free Negroes were forbidden to enter in 1818; those in the State were to be registered, and undesirable ones were banished. Ships carrying free Negroes were quarantined in 1829. In 1859 the penalty for free Negroes entering the State was slavery. Free Negroes were not to carry firearms, read, write, set type or practice medicine. In 1835 fining and whipping was the penalty imposed on free Negroes who aided slaves.

[16]Thus, in 1821, in *Capital Crimes Act* (Dec. 24, *Prince's Digest,* p. 799), death was the penalty for free Negroes or slaves committing rape, murder, insurrection or attempted insurrection. Courts could sentence free Negroes or slaves to death in their discretion for assault with murderous intent, mayhem and burglary accompanied by arson. Laws, 1829, page 172, adds malicious burning.

incendiary speeches were felonies punishable by banishment.[17]

Passage of the statute in 1804 was primarily dictated by the fear that free Negroes, lawless frontiersmen, avid land grabbers, Spanish invaders from Florida or hostile Indians would arouse the already too quickly-growing slave population to insurrection, and thus create a dangerous enemy behind the lines in time of foreign war or civil disturb-

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[17]Clayton's *Compilation of Laws of Georgia,* 1800-1810, page 178, #132. The relevant provisions were:

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is enacted by the authority of the same. That from and after the passing of this act, if any person or persons shall raise or attempt or endeavor to raise any insurrection of slaves, or shall counsel, advise, aid or abet any such insurrection, or shall excite, promote, instigate or stir up or endeavor to excite, promote, instigate, or stir up any such insurrection, every person or persons so offending, shall on conviction thereof, be adjudged guilty of felony, and shall suffer death without benefit of clergy.

Sec. 2. And be it further enacted, That if any person or persons, shall hold any discourse of conversation with any slave or slaves, and shall make or deliver, or cause, or procure to be made, or delivered to any slave or slaves, any discourse, speech, harangue or talk tending to excite such slave or slaves to sedition, tumult or disorder, or write, or print, or publish any such discourse, speech, harangue or talk; every person or persons so offending, shall on conviction thereof, be declared guilty of felony, and banished this state forever. And if any such person or persons shall at any time after being so convicted and banished, return to and be found at large within the limits of this state, he, or they so returning, shall suffer death without benefit of clergy."

ance.[18] Border warfare was going on between Georgians and North Carolinians over a disputed boundary.[19] Militia had to be ordered out seven months after enactment of this statute to prevent the landing of French Negro brigands.[20] But the immediate circumstance giving rise to the passage of this Act lay in the conduct of a Superior Court Judge of Eastern Georgia, who was removed from office for an attempt to "excite insurrection by holding converse with slaves, tending to inflame their minds, threatening to head such insurrection himself and destroy all the white people".[21]

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[18]Bitterness was felt at this time against the Federal Government over Indian affairs. Indian troubles broke down police control. Robbers were abroad in large numbers; mobs of hopeful land grabbers, vagabonds and ungovernable frontiersmen were vital dangers to the young State. Coulter, *History of Georgia*, 170-1, 284-5. And see footnotes 23 and 24 on the fear and danger of free Negroes. Florida was the settlement contiguous to Georgia and was governed by Spain until 1819.

[19]*Journal of House of Representatives of Georgia*, page 5, Regular Sessions, Nov. 1, 1804, Governor's message.

[20]*Journal of House of Representatives of Georgia*, page 48, Dec. 10, 1804.

[21]*Journal of House of Representatives of Georgia*, Extra Session, May 15, 1804, page 19. Charges exhibited against Jabez Bowen, Junior Judge of Superior Courts of Eastern District. He burned a court record; charged a grand jury urging principles (not stated) dangerous to lives and property tending to excite insurrection and involve the country in the horrors of domestic warfare; excited Negro insurrection; committed a grand jury to jail for censuring his charge; pointed a pistol at persons in the courtroom while on the bench. The insurrection statute was considered by the House on May 14 (p. 14), May 15 (pp. 18 and 19), May 17 (p. 22) and May 19. See further, *Senate Journal*, Extra Session, May 17 (p. 7), May 18, May 19 (p. 9), when the Act was passed and delivered to the Governor.

The insurrection section appears in the Penal Code of 1817 in a slightly modified form. The offense was no longer denominated as a felony but as a crime against the State and the People.[22] The unsettled character of contiguous territory and the frequent outbreaks of Indian warfare apparently continued at the time of its reenactment.

Repetition of the statute in the same form occurs in the revision of the Penal Code of 1833. At this time, "abolitionism," "nullificationism" and Indian troubles[23] seem to have created conditions of sufficient stress to warrant continuance of the provision in the Code revision without debate.

In the Georgia Code of 1861 the provisions again appeared.[24]

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[22]O. H. Prince's *Digest of Laws of Georgia*, 1822, page 346.

[23]Coulter, *op. cit.*, page 286; R. P. Brooks, *History of Georgia*. Georgia offered $5,000 reward for Garrison, denominated by Governor Schley as a fanatical insurrectionist masquerading under philanthropy. Nat Turner's bloody insurrection had just taken place in Virginia. Georgia, furthermore, contemplated nullification of, and refused to pay, the Federal tariff of 1832. In 1825 there had been virtual civil war over Indian lands. Indian troubles came to a head in the removal of the Cherokees from Georgia. However, the Senate and Assembly Journals of Georgia, between 1832 and 1834, contain no discussion of the insurrection statute and, so, it is impossible to assert positively that existing conditions were believed to require reenactment. The provision may have been carried forward automatically without specific consideration.

[24]In Section 4214. Sections 4704-4706 show the emphasis with which the provisions were made applicable to Negroes:

> "Section 4704. The following offenses, when committed by a slave or free person of color, shall be punished, on conviction, with death, viz.: Insurrection, or an attempt to excite it; * * *.
>
> "Section 4705. Insurrection shall consist in any combined resistance to the lawful authority of the master or the State,

(*Footnote continued on next page.*)

When substantially the present statute was passed in December, 1866,[25] it was no longer in terms restricted in application to those who incited slaves or Negroes to revolt. Slavery no longer existed and reasons of policy suggested that it would be unwise to have an apparent discrimination in the statute. But consideration of the setting in which it was passed shows, we believe, that it was aimed primarily at conduct analogous to that which had been the target of its predecessors and at other prospective dangers of a temporary character, all of which were the products of post-war conditions and the troubled period of adjustment between emancipation and the tranquil acceptance of new relationships which shortly ensued.

After the close of the War between the States, almost anarchical conditions prevailed in the South[26] and military governors were placed in charge of many of the States. In Georgia, a provisional governor was appointed by the President and plans were made for the restoration of Georgia to its status in the Union. But, first, it was nec-

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with intent to the permanent denial thereof, when the same is manifested or intended to be manifested by acts of violence —the mere resistance of the slave, or his attempt to escape, or actual escape, from the master, shall not constitute insurrection.

"Section 4706. Any attempt, by threats, persuasion, or otherwise, to induce other slaves to join in an insurrection in existence or contemplated, shall constitute an attempt to excite an insurrection."

[25]*Public Laws of Georgia, Penal Code*, 1866, page 152, approved December 15, 1866. The only difference between the statute as passed in 1866 and the present is that as a result of the decision in *Gibson* v. *State*, 38 Ga. 571, the penalty provision was changed (Georgia Laws, 1871, pp. 19-20) to embrace attempts to incite insurrection which that case held were not included. The definition of the offense was not changed.

[26]See footnotes 35-44, *infra*, and supported text.

essary for the State to conform to the conditions laid down by the President. The ordinance of secession was to be revoked[27] and the Thirteenth Amendment approved.[28] To this end the Provisional Governor called a State Convention[29] composed of men who, although native Georgians, had not been active secessionists[30]. The Convention gave way in December, 1865, to a State Legislature composed of conciliatory Southerners.

Among the matters considered by the Convention, and later by the Legislature, was statutory provision for the transition of the Negro from slavery to citizenship. Rights were to be given to the Negro, while white men's lives and property were to be protected.[31]

The desire of Georgia not to arouse opposition to its admission to the Union by enacting a Black Code distasteful to the North, and the desire to be rid of the courts of the Freedmen's Bureau,[32] probably prompted the introduction of a Freedmen's Code in Georgia in which, in blanket fashion, practically every reference to, and legal discrimination against, Negroes was removed from all then existing statutes, which statutes, however, were retained for

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[27]Which was done in the Constitutional Convention of 1865. See *Journal*, page 44.

[28]Slavery was abolished in Convention. See *Journal*, page 125. The Thirteenth Amendment was approved by the Legislature, December 5 and 6, 1865.

[29]*Documentary History of Reconstruction* (Fleming), I, 195, 163-4; Percy Flippin, *H. V. Johnson*, 270-1.

[30]Neither strong secessionists nor active unionists attended the Convention. Clara Thompson, *History of Reconstruction in Georgia*, pages 148-9.

[31]*Doc. Hist. Reconstr.*, I, 243.

[32]The Bureau courts were acting so illegally they had to be abolished. *Rept. of Gen. Tillson*, Senate Ex. Doc. #2, 39th Cong., 2d Sess., page 54.

all other purposes.[33] The Negro was not to be subjected to any other or different punishment from such as was prescribed for white persons committing like offenses.[34]

The Freedmen's Code gradually filtered into the law of Georgia in the Special Session of the Legislature, December, 1865, to March, 1866, and in amendments made in the regular session held during November and December, 1866.[35]

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[33]Because of hostile criticism of Black Codes of other States, Georgia did not make a separate code. *Savannah Herald,* February 13, 1866; *Macon Journal and Messenger,* February 23, 1866. The Code was passed probably to get rid of Bureau courts, erected by Federal authorities to insure protection of Negroes' civil rights just as the Bureau itself protected laborers from unconscionable contracts. Equal legal rights to Negroes in the civil courts would render the Freedmen's courts unnecessary. Clara Thompson, *History of Reconstruction in Georgia,* page 157. See further on Georgia's desire to conform with Northern demands, Coulter, *Short History of Georgia,* 342-3. However, the Code did not give the Negro equal political rights, such as voting and jury duty.

[34]Coulter, *op. cit.,* 342; Thompson, *op. cit.,* 157.

[35]The Constitutional Convention in November, 1865, resolved that a Committee of five be appointed to prepare a system of laws applicable to the changed conditions of the Negroes in Georgia (*Journal of the Constitutional Convention,* 1865, p. 174; *Confederate Records of Georgia,* ed. by Candler, IV, 414-5). The Provisional Governor, by request of the Convention, appointed the Committee (*Savannah Nat'l Republican,* Nov. 23, 1865). On December 19 this Committee reported to the Governor a series of eleven laws for the regulation of Freedmen's rights (*Report of Commrs. on Freedmen's Code to Gov. Jenkins,* December 19, 1865, a pamphlet; *Macon Telegraph,* January 9, 1866; incomplete copy in *Savannah Nat'l Repub.,* January 16, 1866). The preliminary report of the Commissioners was made to the Legislature on December 6 and was referred to the Judiciary Committee of each House (*Journal of House of Representatives of Ga.,* 1865/6, pp. 21-3, and *Journal of*

(*Footnote continued on next page.*)

The absence of records of debates on the Freedmen's Code or on the insurrection statute, leaves the precise reasons for the change to the statute in its present form in some doubt. It may have been a mere automatic renewal of the older insurrection law with references to slaves eliminated. It seems likely that policy (and the

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Ga. Senate, of same date; *N. Y. Tribune*, December 7, 1865). On December 14 Gov. Jenkins referred to the Negroes' sudden transition from slavery to freedom as the "sudden upheaving of an earthquake", and recommended that the Legislature consider the Freedmen's Code (*House Journal*, December 14, 1865).

On January 15, 1866, Gov. Jenkins transmitted a copy of the Report to the Legislature and recommended that it be adopted in toto as law (*Ga. House Journal*, 1865/6, January 15). The Governor said that the code "is just and liberal to the freedmen. * * * It is as safe as it should be to the citizen" (*Savannah Nat'l Repub.*, Supplement, January 22, 1866). On January 17, the Senate and the House agreed to a joint judiciary committee to consider the report (*Ga. House Journal*, 1865/6, January 17).

The Report referred to is prefaced by the following statement by the Commissioners:

> "We are sensible that in presenting this system of laws, we may be subjected to the imputation of having done at once too little and too much; too little for those who are expecting *an instant and speedy remedy for all the ills which the present crisis has brought upon us; too much for those whose prejudices have not yet yielded to the necessities of our situation.*
>
> "*The mischiefs to be remedied are enormous*, and there is more or less of an indefinite hope and expectation, that legislation will afford at once and with all certainty, the proper remedy. It is impossible that this hope can be gratified, this expectation realized. The results which are to ensue from such legislation, presents a problem that can only be wrought out by experience. A prominent factor in the solution must therefore be time. We cannot expect that for this our distressed people will patiently wait, and more or less of dis-

(*Footnote continued on next page.*)

abolition of slavery) to some extent dictated the omission of the limitation upon its application to uprisings of Negroes or Slaves. The conditions at the time of its passage combined the supposed dangers of uprising by former slaves with the new danger incident to the removal of some of the restrictions upon them. The period was an

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appointment must ensue. Prepared to accept this result, we shall not be mortified by intimations of feebleness, or imputations of failure, and shall be satisfied with the humble need of having honestly endeavored to do our part, and thereby contribute aid to those who are charged with the difficult duty of *guarding the State and the persons of color in our midst from the evils of sudden emancipation.*" (Italics ours.)

The Report proposed a system of laws in eleven articles. Article I provided in part:

"§1. A Convention of this State having recognized the emancipation of slaves, and having declared that neither slavery, nor involuntary servitude, except as a punishment for crime, shall ever be established in this State, all statutes, regulations, and municipal enactments concerning slaves, are therefore now inapplicable to the circumstances and conditions of our people.

§2. The statutes, regulations, and municipal ordinances concerning free persons of color in our State, having been passed with more or less of relation to the existence of slavery among persons of color in this State, are also, for reasons stated in the above section, now inapplicable to our circumstances and conditions, and are repealed, except as to offences committed before the passage of this act. * * *"

The Report continues with articles applying to county courts, the relations of husband and wife, parent and child, guardian and ward, master and servant, master and apprentice, the law of contracts, decedents' estates, the criminal law and licenses.

Article XI, entitled "Offences Relative to Persons of Color and Other Offences by White Persons", provided:

(*Footnote continued on next page.*)

interlude between the end of a familiar and the creation of a new relationship between different parts of the population; other sources of danger were inherent in post-war conditions; but all these troubles ended when harmony was established anew at the conclusion of the tragic era of Reconstruction.

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"§1. The Thirteenth Division, Part 4, Title I, of the Code of Georgia, concerning offences relative to slaves, being from Section 4487 to Section 4515, inclusive, is hereby repealed."

Section 3 provided:

"In all offences which require the concurrent action of two or more, committed by white persons and persons of color jointly, the offenders may be separately tried and punished according to the provisions of law for each class of such offenders."

Article XII, entitled "Offences by Persons of Color", provided in part:

"§1. The definitions of and circumstances constituting offences, including those in the foregoing article, the persons capable of committing them, and the defences allowed thereto, as also the rules of evidence and practice on the trial of offenders, wherever applicable, unless expressly excepted, shall be the same for persons of color, as for whites."

Speaking generally, the Report sought to assimilate the rights of Negroes to existing rights of white persons, but certain distinctions were continued. The Report contains no general code of criminal laws and no discussion or recommendation with respect to the insurrection statutes. However, Article XII, §6, provided:

"Any person of color who shall join or unite with any band, society, or association, formed without authority of law for the purpose of injuring white persons in person or property, shall on conviction be punished as provided in §4 of this Article, and shall be moreover liable to punishment for any overt act in violation of law, * * *."

(*Footnote continued on next page.*)

The conditions in Georgia and other Southern States, at the time of the passage of the statute in 1866, seemed, to many, pregnant with danger, due to the release of animosities and removal of the physical restrictions of slavery. From April, 1865, until the close of the Reconstruction period, Georgians continually expressed fears of slave insurrection, especially at Christmas time, 1865.[36]

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Article XI contained a somewhat similiar provision apparently aimed at white persons:

> "§13. Any person who shall be a member or associate of any band, association or combination, formed without authority of law, for the purpose of injuring persons of color, in their persons or property, whether under pretence of punishing crime, or otherwise, shall be guilty of a misdemeanor, and punished, on conviction, by fine or imprisonment in the common Jail or both, at the discretion of the Court; and shall moreover be liable to conviction and punishment for any overt act, according to law."

The Report contains no discussion of the provisions just mentioned, and it seems probable that they were directed, particularly, at organizations of the kind which flourished immediately after the War. (The only known copy of the Report is in the De Renne Georgia Library, Savannah, Georgia.)

[36]While Carl Schurz, Grierson and other Northerners scouted the basis for Southern fears of Negro insurrection (*N. Y. Daily Tribune*, October 28 and December 2, 1865, and March 7, 1866), the following references show vivid fear of Negro insurrection in the South: *Rept. of Joint Committee on Reconstruction*, 39th Cong., 1st Sess., pt. iii; House Misc. Doc., 41st Cong., 2d Sess., page 482; Senate Ex. Doc. #43, 39th Cong., 1st Sess., page 4; Senate Ex. Doc. #2 (Same Congress), page 5; II, *Doc. Hist. of Reconstr.*, 344; *Savannah Nat'l Repub.*, September 21 and November 16, 1865; *Civil War and Reconstr. in Ala.*, 1865-6 (Fleming), page 383 (reports fear of Negro insurrection in Alabama); *Appleton's Annual Cyclopedia*, 1865, page 627 (recites fear of insurrection in North Carolina); Stephenson and Fleming, *Confederacy and Reconstruction*, page 48; J. C. Harris, *History of Georgia to Recent Times* (1896).

Other temporary sources of danger to a community recently returned to the ways of peace after the disruption of a long war, intimately affecting its territory, existed. The Legislature naturally wished to assure the Federal authorities that all of the momentary threats to law and order could and would be controlled. Among the sources of possible trouble were the die-hard secessionists, incipient Ku Kluxers, "jawhawkers", "regulators", "black-horse cavalry"[37] poor whites,[38] "union leaguers", Freedmen's agents[39] and abolitionist ministers seeking to stir up Negro discontent[40] by extravagant promises of "40 acres and a

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[37]"Bands of men styling themselves 'Regulators', 'Jayhawkers' and 'Blackhorse Cavalry' have infested different parts of the State, committing the most fiendish and diabolical outrages upon the freedmen" (*Report of General Tillson*, November 1, 1866, Senate Ex. Doc. #6, 39th Cong., 2d Sess., p. 55; II, *Doc. Hist. of Reconstr.*, 360).

[38]Hostility existed between poor whites and free Negroes (Thompson, *Reconstr. in Ga.*, 129-131; Dennet in *N. Y. Nation*, February 1, 1866; Truman, *N. Y. Times*, November 23, 1865; *Joint Committee on Reconstr.*, 1866, pt. iii, pp. 42, 46, 129).

[39]Union leaguers controlled Negroes, II, *Doc. Hist. Reconstr.*, 3. R. P. Brooks, *History of Georgia*, describes the Freedmen's Bureau as a centre for office-seekers and idle Negroes, a political machine. See also *Ku Klux Rept.* (1871), *Georgia Testimony of Gen. Wright*, 272, *Ibid., Minority Rept.*, 441; *House Rep. Minority Rept.*, #121, 41st Cong., 2d Sess., pages 47, 53; J. Wall, a Negro, in his *Carpet Bag Rule in Florida*, said that the Bureau, with the best intentions in the world, was the worst curse of the race.

[40]R. P. Brooks, *Hist. of Ga.*, 324-7. Negroes were encouraged by agents of the Freedmen's Bureau and by the "carpet baggers" to believe that the white people's land would be divided among them.

mule" for every Negro.[41] In addition to these political rivalries giving rise to riotous acts, robbery, stock stealing and crimes of violence were common.[42] So great were the fears of disorders and insurrection that the Georgia Constitutional Convention, in November, 1865, requested the Provisional Governor to provide a police force in the several counties throughout the State. This was done before December.[43]

The source and root of these conditions lay in the many diverse consequences of the War.[44] The Negroes were

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[41]These elements were to resolve themselves after 1866 into the Radical Republicans, "scalawag southerners" and carpet-bag legislators opposed by the conservative Southerners and Ku Klux Klan. The latter organization was founded in Tennessee in May, 1866 (W. G. Brown, *Lower South in American History*, ch. IV). "There were scores . . . of secret protective and revoluntionary societies in the South, ranging from the small bodies of neighborhood police, which were common in 1865 and 1866, to the great federated orders like the White Camelia covering the entire South . . ." (II, *Doc. Hist. of Reconstr.*, p. 327).

[42]Conditions were so primitive that horse stealing was made punishable by death (Coulter, *op. cit.*, 330); stealing stock (Avery, *Hist. of Ga.*, p. 353); violence by whites against Negroes (*N. Y. Tribune*, September 4 and 15, 1865, February 6, 1866). Frequent examples of bushwacking, plundering and stealing by Negroes and young whites were recorded in the spring and summer of 1865 (*Official Records of War of Rebellion*, vol. XLIX, pt. ii, pp. 1061-2; vol. XLVII, pt. iii, pp. 595-6, 665-6; *N. Y. Times*, December 11, 1865; *N. Y. Herald*, May 20 and 21, 1865; *Macon Telegraph*, December 1, 30, 1865).

[43]Avery, *History of Ga.*, page 353; *Confederate Records of Georgia*, IV, 97, 100, 294; *Macon Telegraph*, May 24 and June 1, 1865 (expresses need of military authority against vagrants).

[44]See, generally: E. C. Woolley, *Reconstr. in Ga.*, pages 17-8; Flippin's *H. V. Johnson*, page 264 ff.; Thompson, *Reconstr. in Ga.*, page 43; Brooks, *Hist. of Ga.*, pages 302, 321; *Milledgville Federal Union*, January 9, 1866.

demoralized. Hoping for freedom from labor as a concomitant of emancipation, vagrant and vagabond Negroes swarmed towards the cities where death and starvation[45] alone were awaiting them. The demoralization of the Negro led to disruption of the labor system. The latter outcome, combined with the destruction of railways by Sherman, financial distress, Federal taxes, disorganization of agriculture and the growth of city population,—all brought about the destruction of the old social order of planters, lawyers and factors. Destruction of the old social system, decrease in white population and proportionate increase in black population, demanded a new adjustment of relations between the two races.[46] The fear entertained by Southerners that the Negroes would be stirred to insurrection by Christmas, 1865,[47] proved to be unfounded,[48] but conditions giving rise to disorder, and the fears thereof,[49]

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[45]Death rate: over 30,000 Negroes in one year in Augusta; 500 a month in Macon (*Savannah Nat'l Republican*, November 16, 1865; *N. Y. Times*, December 31, 1865; *Joint Committee on Reconstr.*, pt. iii, p. 173; *Confed. & Reconstr.*, Stephenson & Fleming, p. 41).

[46]Coulter, *op. cit.*, 331-5; Brooks, *Hist. of Ga.*; C. Thompson, *Reconstr. in Ga.*, Flippin, *H. V. Johnson.*

[47]See footnote 36 and text, *supra.*

[48]Some outrages occurred in the last week of December, 1865, and early January, 1866, but it was, in fact, an unusually quiet Christmas. *Milledgville Fed. Union*, January 2, 1866; *Savannah Nat'l Repub.*, January 1, 3, 10, 12, 1866; Stephenson and Fleming, *Confed. & Reconstr.*, 48; *Confed. Recs. Ga.*, IV, 44, Governor's message of January 8, 1866.

[49]*The Critical Year*, by H. K. Beale, pages 155-6: "The South swarmed with Radical trouble-makers and nascent carpet-baggers". In March, 1866, Grant had to forbid Negro celebration which threatened disorder in Richmond, Va. There was rioting in New Orleans,

(*Footnote continued on next page.*)

continued until several years after the enactment of the present statute in 1866.

This background and history seem to us to demonstrate that the statute was aimed at quelling possible disorders of the special and unprecedented kind threatened immediately after the Civil War. The dangers then facing the State soon passed with the natural adjustments which followed.

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also rowdyism in Atlanta, Ga. (Thompson, *Reconstr. in Ga.*, 132). Clara Thompson, *Reconstr. in Ga.*, pages 361-394, discusses the Ku Klux Klan and social disorder which lasted from 1865 until 1871. Also see pages 116-7, 129-131. Note that the spirit of Georgia, itself, on the other hand, was to put down rioting and disorder. *Journal of House*, 1866, page 31, November 1, 1866, Gov. Jenkin's advice to the Legislature. "Our interest lies in eschewing political excitement, studiously avoiding all conflicts with the authorities, unchosen by us, but placed over us. . . ."